

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT,

vs.

SAN GABRIEL/POMONA REGIONAL CENTER,

Service Agency.

OAH No. 2021060785

DECISION

Eileen Cohn, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on August 31, 2021, by video and telephonic conference.

Daniel Ibarra, Fair Hearing Specialist, represented the San Gabriel/Pomona Regional Center (Service Agency).

Claimant's Mother and Sister, authorized representatives, represented Claimant.¹

Oral and documentary evidence was received. At the conclusion of the hearing the record remained open until October 11, 2021, for the parties to submit the most recent Individual Program Plan (IPP) with addendum and Claimant's comments. The most recent IPP with addendums was timely submitted but it was not marked or admitted because Claimant filed an objection to its admission on the grounds there were errors, and the Service Agency notified OAH that it did not oppose Claimant's objection.

The record was closed, and the matter submitted on October 11, 2021.

SUMMARY

Claimant requested funding for a treadmill to address her behavioral and health-related challenges. At the time of the request and through the time prior to the close of the hearing record, Claimant has been receiving all services from the school district and Service Agency in the family home.

Service Agency denied Claimant's requests on the grounds the requested treadmill does not address her developmental disability, generic and medical

¹ The names of the Claimant and family members are withheld to protect their privacy.

resources had not been exhausted, and funding for the treadmill is one of the responsibilities shouldered by parents of children without disabilities.

Claimant provided persuasive and convincing evidence the treadmill was not in use for activities typical for adult children without disabilities, and access to all third-party and medical resources for these supplies had been exhausted at this time. As such, Claimant is entitled to funding for the treadmill. The Service Agency shall reimburse the family for the basic treadmill in an amount not to exceed \$2,000, exclusive of tax and shipping or delivery costs.

ISSUES²

Is the Service Agency required to fund a treadmill for Claimant's use in the home?

EVIDENCE

The Service Agency submitted Exhibits 1-7, and witness testimony, Giselle Salas, Manager, Transition Services. Claimant submitted Exhibits A-P), with Exhibits L and M,

² The parties stipulated to the issue at the outset of the fair hearing.

marked but not admitted³ and witnesses, Mother, Father Sisters, Veronica Cardenas, Claimant's teacher, Emily Evans, Claimant's Aide.⁴

FACTUAL FINDINGS⁵

Jurisdictional Matters and Background

1. Claimant is a 19-year-old conserved adult, eligible for regional center services as an individual with Autism and Moderate to Severe Intellectual Disability (ID). She has been diagnosed with Atrial Septal Defect Chromosome Deletion (Deletion Syndrome). She has been diagnosed with a heart condition which required corrective

³ Claimant moved for a Protective Order to Seal Exhibits as a precaution against a Public Records Act request. (Gov. Code §§ 6250-6270.7.) Although a fair hearing is public, generally medical records and other records of a client of any regional center are confidential and are disclosed only to the Service Agency and as part of a fair hearing. The Service Agency stipulated to sealing the Exhibits, and as an assurance to the Claimant, the ALJ granted the motion, and issued a Protective Order sealing all Exhibits excepting Exhibits 7, A-C, L-M (marked/but not admitted), N, which contained nonconfidential information; i.e., either publicly available research, statutes or the Purchase of Service Guidelines.

⁴ After a further review of Exhibits L-M they were not admitted because they were irrelevant to a determination of the fair hearing issue.

⁵ The findings rely on all the admitted and relevant evidence, whether are not specifically cited in this decision.

surgery at two years of age. She has taken various medications that affect her mood, including Risperidone, a common medication for an individual with Autism. Claimant resides at home with her biological parents. She has two older adult sisters who participate in her care, who do not live in the home, but are co-conservators, and provide direct support to her when they visit. Her family is close and are all familiar with Claimant's needs.

2. Claimant has a range of challenges that limit her ability to participate independently in activities of daily living (ADL). Claimant has limited verbal communication skills. She can use words and simple sentences, but her articulation deficits make it difficult for her to be understood. Claimant's communication deficits have a negative impact on her behaviors.

3. Claimant's ADL deficits are further compromised by her negative behaviors which include hitting herself, throwing herself on the ground or banging herself against the wall, temper tantrums and crying. Her behaviors became more pronounced with her medication used to address her heart condition, including Risperidone. Her behaviors are also related to her Autism. Claimant does not have any personal friends. The Covid-19 pandemic has further limited her interaction with peers and the community. She requires close supervision to avoid elopement and cannot exercise judgment with people or when navigating the community.

4. Claimant must be constantly monitored by her family, teacher and caretakers. She is fully ambulatory but, in addition to her other challenges, she has balance issues and falls easily due to a foot condition.

5. Claimant's family and Claimant have relied on the treadmill to mitigate Claimant's negative behaviors and to maintain a healthy weight. Claimant's medication for the behaviors increases her appetite which places her at risk for obesity.

6. Claimant has used the treadmill consistently over the years to calm her and to provide exercise to prevent weight gain. The treadmill was a private gift to the family, but no longer functions safely. Father has had to retrofit the treadmill many times due to Claimant's behavior. The treadmill no longer has operative safety features. Father has found a retail sporting goods company that can supply a basic treadmill for approximately \$2000, exclusive of shipping and tax.

7. Mother contacted the Service Agency in March 2021 to request funding for a new treadmill.

8. On March 17, 2021, the Service Agency submitted a request to the Richard D. Davis Foundation for the Developmentally Disabled, Inc. (Ex. 4.), referred to as a "Foundation Request" for funding of the treadmill. On May 5, 2011, the request was denied. After the denial, the Service Agency conducted its own review and determined the equipment was not directly related to Claimant's developmental disability and should be funded by other resources appropriate for medical needs, including Medi-Cal and Supplemental Security Income (SSI), or the family as a generic resource. The Service Agency relied upon Welfare and Institutions Code (Code) sections 4646.4, subdivision (a)(2) (utilization of generic services and supports, and (a)(4) (family responsibility for providing services for a minor child without disabilities), Code section 4659, subdivision (a) (other sources of funding), and its Purchase of Service Guidelines (POS Guidelines). (Ex. 1.)

9. Mother timely appealed the Service Agency's decision and disputed the factual and legal basis for its decision.

10. Mother disputed Code section 4646.4, subdivision (a) supported denial. Mother claimed Code section 4659, subdivision (a) did not deprive Claimant of her right for funding of the treadmill. She maintained it was not a generic service because Claimant did not have access to exercise in ways individuals without disabilities did. Complicated by the Covid-19 pandemic, Claimant can not safely access a public gym, or regularly take walks due to disability-related behavioral issues. Claimant is at great risk due to her lack of environmental awareness. Claimant also rejects physical contact even from her one-on-one aide which makes other types of exercise problematic.

11. Mother maintained she exhausted her ability to access funding from other sources, and maintained that the POS Guidelines supported funding when other sources of funding are not available and Claimant meets certain criteria including: the equipment is associated with a developmental disability, developmental delay or established risk condition; the requested treatment is medically necessary; and Service Agency clinicians reviewed and approved the need (which is being appealed by this fair hearing); and Claimant is either not eligible for Med-Cal, private insurance or another third party payer. (Ex. 2.)

12. All jurisdictional requirements have been met for this matter to proceed to fair hearing.

Claimant's Treadmill Request

13. Parents and the Service Agency participated in the Individual Program Plan (IPP) process. Prior to the hearing, Claimant's most recent completed IPP was held on June 26, 2020 at the time Claimant turned 19. The parties were requested to

provide the most recent IPP, which they referred to as amendments to the 2020 IPP but was not admitted after both stipulated the 2021 Addendum IPP was still incomplete because there was inadequate time for Claimant's family to provide corrections and did not provide information relevant to the dispute.

14. The 2020 IPP confirmed Claimant's deficits, including her behaviors, foot pronation which results in falling and overall challenges with ADL. Claimant exhibits weekly "self-injurious behaviors of hitting herself with her hands or banging herself against the wall." She also throws herself on the floor when extremely upset, has temper tantrums when she transitions from activities or does not get her way, which can manifest as screaming and swatting at caregivers, or property destruction. Claimant cannot safely navigate the outdoors. She has no awareness of her environment. (Ex. 3.)

15. At the time of the 2020 IPP, and the 2021 Addendum IPP Claimant had been receiving all her school services at home. Parents found problems with the school district program and reached an agreement with the school district on a "hybrid" program which involved two days at school for community-integration activities, and three days at home with instruction. Claimant's exclusively home-based services commenced after November 2019. Claimant has been assisted at home by personal aides and an education tutor. At the time of the fair hearing, it was expected that Claimant would start receiving school-based services partially outside the home, but from the evidence this did not change the need for the treadmill at home. Claimant does receive services from the Service Agency which are not disputed in this fair hearing. (Ex. 3 and Mother's testimony.)

16. Claimant provided credible and persuasive testimony from her teacher, Veronica Cardenas, Emily Evans, her caregiver, Mother, Sister One and Sister Two, and Father, in support of funding for the treadmill.

17. Claimant's family introduced her to the treadmill at a young age and it has remained a principal tool in managing her behavior and mitigating the side effects of her disabilities. (Ex. O.)

18. Ms. Cardenas, an experienced educator, has worked with Claimant five days a week for over a year and assists her with learning and improving her ADL, in addition to basic academic education. Ms. Cardenas's work shift through the five-day school week, for three to five hours a day, allows her to make direct observations about Claimant's behavior. During late May or June, 2021, during a period where Claimant's medication was adjusted, she observed Claimant to become even more aggressive and emotional than usual. Even during typical days, Claimant's mood and behaviors can change dramatically, and Ms. Cardenas learned to use the treadmill to calm her. When Claimant is not sufficiently prepared for a new activity, which involves a level of social interaction with a person outside her household, such as a Zoom session with her therapist, she will become hyperactive and aggressive and will at times "lash out" by attempting to strike something or someone with the palm of her hand.

19. Ms. Cardenas found the profound benefits to Claimant from her access to the treadmill. Ms. Cardenas has had Claimant use the treadmill upwards of twice daily. To calm Claimant and prepare her for transitions, such as a Zoom session, Ms. Cardenas will have Claimant exercise on the treadmill at least 15 minutes before the appointment. When she has not used the treadmill before a new activity, such as a

lesson, Ms. Cardenas has had to stop the lesson and put her on the treadmill to regulate her mood and secure her cooperation.

20. Claimant is very strong and when frustrated she has hit the treadmill screen cracking it after two strikes. After Claimant struck the screen, there is no longer notification of the speed or time duration of her exercise.

21. Emily Evans has worked with Claimant as her aide since March and works 20-40 hours a week, mainly Tuesday through Saturday. She testified and provided a written statement. (Exs. D & I.) Ms. Evans assists Claimant with all her ADL. Ms. Evans confirmed the treadmill serves to steady Claimant's emotions and behaviors, which include tantrums, elopement and aggression, which become "significantly worse" without the treadmill. (Ex. D.) Claimant will ask for the treadmill and is "immediately calmer." (Evans Testimony). The treadmill seems to calm her down in any situation. Particularly when Claimant is having a bad day, and is having trouble with her digestion, which has been a problem, the treadmill will not only prevent her from having severe and multiple outbursts but also can stimulate her bowel movements and urination. (Evans Testimony.)

22. Mother's testimony closely mirrors the testimony of Ms. Cardenas and Ms. Evans. Claimant suffers from attention deficit hyperactivity disorder (ADHD), which along with her anxiety, adds more challenges to her other diagnoses, and hyperphagia, a condition where she is not aware of the limits to her food consumption. She also suffers from hypotonia, which affects her balance and coordination. Claimant is always monitored on the treadmill but over time from afar. However, since Claimant broke the treadmill screen she must be monitored more closely because there are no controls on the speed and duration. Workarounds have been developed to measure the speed and duration, through the cell phone and a timer in the oven, but these do not provide the

same safeguards as the devices installed with the treadmill. Mother does not want Claimant to be heavily medicated and her observations of Claimant establish the treadmill mitigates Claimant's behaviors and improves her overall health. (Ex. P; Mother's testimony.)

23. Claimant's family has utilized the treadmill for Claimant for years. It was a gift from a family friend. Mother started her on the treadmill at a young age. Mother reports the treadmill reduces Claimant's need for medication to address her behaviors and supports her overall health, including her weight, which is compromised by her medication regime, the side effects of medication. The treadmill option cannot be replaced by other forms of exercise because of Claimant's lack of environmental awareness, her balance issues, her inability to interact with same-aged peers, and the limitations imposed by Covid-19. (Ex. P; Mother's testimony.)

24. Sister One, an attorney, who has lived in Northern California for ten years, has been very involved in Claimant's care throughout Claimant's lifetime. Sister One visits home monthly to relieve her parents from caretaking responsibilities and travels with Claimant twice yearly, taking her from the family home to Northern California, to spend time with her. Claimant is not independent, her ADLs have not improved from her early teens, she still tantrums, but it is harder to control as she ages, and her tantrums appear to have intensified over the last year. Claimant can elope, hit, flail her arms, especially when she gets excited. Claimant's verbal limitations and inability to express herself, have further compromised her behaviors.

25. Claimant's medical doctor, Jeffrey Gin, M.D., provided support for the funding of a treadmill. He reported there was no insurance code for a treadmill so he could not process the request. However, he provided an opinion that the treadmill was

beneficial due to Claimant's "chronic medical conditions, including cardiovascular disease." (Exs. 5 and G.)

26. Sister Two, a medical doctor, currently participating in a residency program out-of-state, provided testimony, about her personal observations of Claimant, and provided medical testimony, supported by exhibits discussing Claimant's Deletion Syndrome, the benefits of the treadmill, the side effects of Risperidone, Claimant's medication and the benefits of aerobic exercise for gastrointestinal mobility in psychiatric patients. (Exs. B, C, and N.). Sister Two established her medical expertise. Prior to medical school, Sister Two, inspired by Claimant, worked in a medical laboratory focused genetics as a researcher.

27. Claimant also suffers from hyperphagia, which inhibits the brain from letting Claimant know when she is full. As such, Claimant overconsumes food because she has no sense of what is enough. Claimant's heart condition and chromosomal mutation has resulted in developmental delays from her delayed forebrain development, which results in delayed motor development and balance issues. Claimant did not walk until she was five or six years of age. Claimant is unstable and requires assistance to keep her balance. Claimant's heart condition from her chromosomal mutation compromises her strength and vitality.

28. Sister Two, declared Claimant to be an "amazing girl" who needed the support of a treadmill to provide her with her "best chances" for success. Claimant also participates in a swimming program twice weekly. Sister Two maintained the treadmill provided the type of exercise she could do at least once a day, something she could not do with swimming, which she participates in twice a week, and which primarily focuses on her upper body strength. (Sister Two testimony.)

29. Risperidone's side effects included irregular arrhythmia, hyperglycemia and its related confusion and movement problems. Claimant no longer takes Risperidone, because it exacerbated her anxiety and behaviors, but by history it demonstrated the importance of the treadmill, especially when Claimant is experiencing more extreme behaviors.

30. Father has repaired the treadmill as much as possible, to ensure its continued functioning, but after numerous retrofits, he has exhausted his ability to fix the treadmill and it needs to be replaced.

31. Father has identified a comparable "basic" treadmill model at a retail sporting goods store and obtained a price of approximately \$1600 plus tax and delivery. Father will most likely still have to retrofit the plastic parts on the foot bed and at the bottom of the panel with steel bar so that it won't break as easily. Claimant's family requests funding for the basic model. They are not asking for funding for the more expensive model which is approximately \$3,000. (Father's testimony.)

Availability of Generic and Medical Resources

32. Mother provided credible, convincing and persuasive testimony supported by documentation of her efforts to access medical and other resources to obtain the requested supplies.

33. Mother was diligent in her efforts to contact other providers. Claimant has been schooled in the home since November 2019, and even if she returns to a school site, it will not be full-time. Based upon her behaviors and health the treadmill is in use 7 days a week and it is used to mitigate behaviors in the home and community, not just school. There is no insurance code for a treadmill and her doctor

could not submit a request to Medi-Cal or any other insurer. Mother applied for SSI in 2020 and received conflicting information, including a rejection and conflicting responses about whether the application was received or whether it was received and was still being processed. Mother has been diligent in pursuing SSI and filed an appeal (Ex. J.)

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Lanterman Act governs this case. Code § 4500 et seq.)⁶ An administrative “fair hearing” to determine the respective rights and obligations of the consumer and the regional center is available under the Lanterman Act. (Code §§ 4700-4716.) Claimant requested a fair hearing to appeal the Service Agency’s NOPA. (Factual Findings 1-11.)

2. Because Claimant seeks benefits or services, Claimant bears the burden of proving she is entitled to the services requested. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9; *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) Claimants must prove their cases by a preponderance of the evidence. (Evid. Code, § 115.) Claimant met her burden of proof. (Factual Findings 1-40.)

⁶ Further statutory references are to the Welfare and Institutions Code.

The Lanterman Act

3. The Lanterman Act acknowledges the state's responsibility to provide services and supports for developmentally disabled individuals and their families. (Code § 4501.) The state agency charged with implementing the Lanterman Act, the Department of Developmental Services (DDS), is authorized to contract with regional centers to provide developmentally disabled individuals with access to the services and supports best suited to them throughout their lifetime. (Code § 4520.)

4. Regional centers are responsible for conducting a planning process that results in an IPP. Among other things, the IPP must set forth goals and objectives for the client, contain provisions for the acquisition of services based upon the client's developmental needs and the effectiveness of the services selected to assist the consumer in achieving the agreed-upon goals, contain a statement of time-limited objectives for improving the client's situation, and reflect the client's particular desires and preferences. (Code §§ 4646, subd. (a)(1), (2), and (4), 4646.5, subd. (a), 4512, subd. (b), 4648, subd. (a)(6)(E).)

5. Code section 4646.4, subdivision (a) provides: Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's IPP developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following: (1) Conformance with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434; (2) Utilization of generic services and supports when appropriate; (3) Utilization of other services and sources of funding as contained in Section 4659.

6. Although regional centers are mandated to provide a wide range of services to facilitate implementation of the IPP, they must do so in a cost-effective manner. (Code §§ 4640.7, subd. (b), 4646, subd. (a).) A regional center is not required to provide all the services that a client may require but is required to “find innovative and economical methods of achieving the objectives” of the IPP. (Code § 4651.) Regional centers are specifically directed not to fund duplicate services that are available through another publicly funded agency or “generic resource.”

7. Code section 4659 subdivision (a) states "Except as otherwise provided in subdivision (b) or (c), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. Also, Code section 4648 subdivision (a)(8) states: "Regional center funds shall not be used to supplant the budget of any agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services."

8. If a service specified in a client’s IPP is not provided by a generic agency, the regional center must fund the service to meet the goals set forth in the IPP. (Code § 4648, subd. (a)(1); see also, e.g., § 4659.)

9. Regional Centers are also required to rely on their Purchase of Service Guidelines, as approved by the department pursuant to Code Section 4434, subdivision (d). (Code, §4646.4, subd. (a) (1).) The pertinent guidelines require the family to provide medical care through private insurance and other sources of funding with exceptions made when four criteria are met: the equipment is associated with a developmental disability; it is medically necessary; the regional center consultants have approved the treatment; and the individual cannot access insurance, and the regional center has determined the appeal of any denial is unwarranted.

Disposition

10. This fair hearing presents unique circumstances. Claimant presents a complex profile of deficits that are inclusive of developmental disabilities, Autism and Intellectual Disability, for which she was granted eligibility under the Lanterman Act, and those which independent of her eligibility categories, would not. However, her combined deficits conspire to require interventions which are unique to her disabilities and are not typical for nondisabled peers.

11. The evidence persuasively established the treadmill directly addresses Claimant's disability. Notably, Claimant established the treadmill was warranted based upon her complex profile and her developmental disabilities; specifically, her behaviors, which are also characteristic of individuals with Autism.

12. Claimant has also exhausted all other resources for funding, inclusive of insurance and SSI. Claimant's circumstances constitute an exception to the POS Guidelines. Assuming the treadmill is also a medical necessity, Claimant has exhausted her medical sources of funding.

13. Claimant's education has been restricted to the home, and notwithstanding her partial return to a school site, the evidence established the treadmill addresses her behaviors in the community throughout the week, outside of school hours.

14. Claimant established the cost of the treadmill is approximately \$1600, exclusive of tax and delivery or shipment. To avoid any confusion, and any changes in the pricing between the hearing and this decision, the Order shall limit the reimbursement to \$2000 exclusive of tax, delivery and/or shipment.

ORDER

1. Claimant's appeal is granted.
2. Service Agency shall reimburse Claimant's family for the cost of treadmill in an amount not to exceed \$2000, exclusive of tax and shipment or delivery, within 30 days of receipt of the retail supplier's receipt which identifies the purchase and confirms payment.

DATE:

EILEEN COHN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.